

L.M., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
Greene, NY, Employer**

Appearances:

Daniel M. Goodkin, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

Before:

JURISDICTION

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the May 29, 2018 decision, OWCP received additional evidence. However, the *Board's Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include the additional conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear as a consequence of the accepted December 12, 2014 employment injury.

FACTUAL HISTORY

On January 5, 2015 appellant, then a 51-year-old rural carrier, filed a notice of recurrence (Form CA-2a) claiming disability under OWCP File No. xxxxxx938.⁴ She alleged that she reinjured her left shoulder moving mail from her vehicle to her supervisor's car on December 12, 2014. Appellant stopped work on that date. The employing establishment indicated that appellant had been medically cleared to return to work with no restrictions on November 12, 2014, from accepted employment injury. As new employment factors were indicated, OWCP converted the recurrence claim to a new traumatic injury claim (Form CA-1), and assigned OWCP File No. xxxxxx312.

In support of her new claim appellant submitted a December 18, 2014 report by Dr. Thomas Van Gorder, a Board-certified orthopedic surgeon, diagnosed status post rotator cuff repair and decompression of the left shoulder. Dr. Van Gorder noted that appellant had attempted to return to work, but was having difficulty, especially with driving. He explained that she was having difficulties maintaining the shoulder in an abducted position during her work shifts, but that she had satisfactory range of motion and arm strength. Dr. Van Gorder advised that appellant had a recurrence of discomfort and recommended physical therapy.

In e-mail correspondence dated February 27, 2015, P.S., the employing establishment postmaster, explained that on December 12, 2014 appellant reported that her vehicle had broken down and she then went out to retrieve the mail and bring it back so that another employee could finish the route. P.S. explained that as they were transferring the mail, appellant notified her that her shoulder "had been bothering her more and more from the previous injury and that she felt something pull."

By decision dated March 13, 2015, OWCP denied appellant's claim finding that the factual component of her claim was established. However, it denied the claim because the medical evidence did not contain a firm diagnosis of any medical condition. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 24, 2015 appellant requested reconsideration of the March 13, 2015 decision.

In a February 19, 2015 report, Dr. Van Gorder referred to appellant's June 21, 2013 employment injury. He diagnosed status post rotator cuff tear of the left shoulder. Dr. Van Gorder explained that she was not quite a year post left shoulder manipulation, arthroscopy, decompression, debridement, and rotator cuff repair. He explained that appellant had gone through physical therapy and tried to return to work a couple of months earlier and had a lot of difficulties with her work activities. Dr. Van Gorder indicated that she had been off work since the end of

⁴ OWCP accepted the June 21, 2013 claim for a complete rotator cuff rupture on the left.

December and was doing home exercises. He also completed a duty status report (Form CA-17) on February 19, 2015 and diagnosed a left rotator cuff tear.

In a March 10, 2015 attending physician's report (Form CA-20) Dr. Van Gorder noted appellant's accepted employment injury of June 21, 2013. He diagnosed left rotator cuff tear repair and decompression.

By decision dated July 6, 2015, OWCP denied modification of the prior decision. It explained that appellant had not submitted medical evidence which contained a history of injury, a valid diagnosis, or an explanation of how the diagnosed condition was caused, aggravated, or contributed to by factors of her federal employment.

On August 17, 2015 appellant requested reconsideration. OWCP continued to receive medical evidence.

In an August 26, 2015 report, Dr. Van Gorder noted that appellant initially injured herself at work in June 2013. He noted that in April 2014 she had rotator cuff surgery and returned to work in November 2014. Dr. Van Gorder explained that on December 12, 2014, appellant's car broke down, while moving the mail to another car, appellant felt some type of snap or pain in her shoulder. He explained that left shoulder MRI scan revealed a partial tear of the rotator cuff. Dr. Van Gorder opined that this was considered employment related. He noted that appellant never completely recovered despite satisfactory motion and strength, and that appellant had difficulty with heavy lifting. Dr. Van Gorder explained that appellant believed that she could probably perform light-duty work. He noted that there was no light-duty work available for appellant at the employing establishment.

By decision dated January 14, 2016, OWCP found the evidence of record was sufficient to vacate the July 6, 2015 decision because Dr. Van Gorder provided a history of appellant's condition prior to December 12, 2014, and an accurate factual history of the injury of December 12, 2014, with a diagnosis of left partial rotator cuff tear and a brief explanation of the cause of the December 12, 2014 injury. On January 14, 2016 it accepted the claim for partial rotator cuff tear of the left shoulder.⁵

In a May 5, 2016 report, Dr. Van Gorder diagnosed status post shoulder repair for a rotator cuff tear of the left shoulder and a partial cuff tear of the right shoulder. He explained that appellant had issues with both shoulders since working at the employing establishment. Dr. Van Gorder noted her initial injury to her left shoulder in June 2013, and her subsequent injury in December 2014. He noted that appellant started to develop discomfort in the right shoulder and explained that she did not have specific trauma to the right shoulder, but rather it resulted as she favored her left shoulder. Dr. Van Gorder explained that she had a right shoulder MRI scan in June 2015 which revealed a partial cuff tear and tendinitis. He noted that appellant was unable to obtain treatment for the right shoulder. Dr. Van Gorder also noted that the right shoulder had excellent strength, and a little sub acromial crepitus.

In a July 28, 2016 report, Dr. Van Gorder diagnosed status post rotator cuff tear of the left shoulder and a partial tear with tendinitis of the right shoulder. Regarding the right shoulder, he

⁵ Appellant received wage-loss benefits retroactively on the supplemental roll as of February 1, 2015 and on the periodic rolls as of July 24, 2016.

explained that appellant developed impingement pain, tendinitis, and discomfort of the right shoulder which he opined “is definitely related to her left shoulder injury.” Dr. Van Gorder concluded that her right shoulder condition was caused by overuse secondary to her favoring her left shoulder, which had been injured at work.

In an August 3, 2016 report, Dr. Van Gorder repeated his opinion from his July 28, 2016 report regarding the right shoulder.

In a letter dated August 29, 2016, counsel requested that the acceptance of appellant’s claim be expanded to include the additional conditions of impingement, tendinitis, and a partial rotator cuff tear of the right shoulder. He alleged that the conditions were a consequence of overuse of the right shoulder due to her accepted left shoulder conditions. Counsel referred to Dr. Van Gorder’s reports. He argued that Dr. Van Gorder provided an unequivocal opinion and provided the requisite medical rationale to establish that appellant’s right shoulder condition was related to her overuse of the shoulder to compensate for her work-related injury to her left shoulder.

In a development letter dated November 18, 2016, OWCP advised appellant of the evidence needed to establish her claim for consequential conditions to her right shoulder. It afforded appellant 30 days to submit additional evidence.

OWCP thereafter received a June 12, 2015 MRI scan of the right shoulder read by Dr. Imanuel Somers-Dehaney, a Board-certified diagnostic radiologist, findings included a partial tearing of the supraspinatus partial articular surface tendon with avulsion of approximately 50 percent. It also revealed impingement on the myotendinous junction of the supraspinatus tendon with fluid along both articular and bursal substance of subacromial subdeltoid bursa, bursitis, and biceps tendon tenosynovitis.

On December 16, 2016 OWCP requested that an OWCP district medical adviser (DMA) provide an opinion as to whether the accepted injury to appellant’s left shoulder was competent to produce the injury to the right shoulder. It requested that the DMA review and specifically comment on the opinion provided by Dr. Van Gorder in his reports dated July 28 and August 3, 2016, regarding the conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear.

In a December 29, 2016 report, Dr. David Slutsky, a Board-certified orthopedic hand surgeon serving as a DMA, noted appellant’s history of injury and medical treatment. Regarding the right shoulder condition, he advised that it was impossible to determine with any certainty whether the left shoulder condition had caused the right shoulder condition, unless a right shoulder MRI scan was performed prior to the work-related injury of the left shoulder on December 12, 2014. The DMA explained that an apparent asymptomatic partial right rotator cuff tear could not be ruled out. He opined that this was “the only way to determine if this lesion was preexisting or whether it developed following the accepted work-related injury.”

The DMA concluded that the acceptance of appellant’s claim should not be expanded to include the consequential conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear. He referred to Dr. Van Gorder’s December 18, 2014 notes, that appellant was pain-free with normal shoulder range of motion following the left rotator cuff repair and explained that overuse of the right shoulder was “not medically probable in view of the normal functioning of her left shoulder.” The DMA also reviewed Dr. Van Gorder’s medical reports dated

July 28 and August 3, 2016 and explained that appellant stopped work in December 2014 and remained off work since that time. However, there was no mention of appellant's right shoulder pain until the report of May 5, 2016, almost two year later. The DMA further noted that appellant had a right shoulder MRI scan on June 12, 2015, more than one year following the left rotator cuff repair. He explained that if she "had remained working in some capacity, especially at a job that required overhead lifting, it would be reasonable to assign the patient's development of right shoulder pain and partial rotator cuff tear to overuse, but this is not the case." The DMA noted that if additional medical records were provided that documented the onset of appellant's right shoulder pain while she was still employed by the employing establishment or at any other job following the left rotator cuff repair, then the issue of causation could be revisited.

By decision dated March 8, 2017, OWCP denied expansion of the acceptance of appellant's claim to include right shoulder conditions consequential to her accepted left shoulder employment injury. It explained that the medical evidence of record did not establish that the conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear resulted as a consequence of the accepted incident/condition.

By letter dated June 20, 2017, OWCP referred appellant for a second opinion examination with Dr. Kevin Scott, a Board-certified orthopedic surgeon, to assess appellant's current condition.

An August 31, 2017 right shoulder MRI scan read by Dr. Andrew Goldschmidt, a Board-certified diagnostic radiologist, revealed no full-thickness rotator cuff tear. A July 17, 2013 MRI scan of the left shoulder read by Dr. Goldschmidt, revealed a small nonretracted full-thickness tear at the anterior supraspinatus.

In a July 13, 2017 report, Dr. Scott noted appellant's history of injury and treatment, examined appellant, and provided physical examination findings. He found full range of motion of both shoulders and diagnosed a rotator cuff tear of the left shoulder. Dr. Scott explained that there were no other injuries due to the December 12, 2014 accident. He noted appellant's preexisting left shoulder rotator cuff tear from her 2013 injury. Dr. Scott reviewed her June 12, 2015 MRI scan of the right shoulder which revealed partial tearing of the supraspinatus tendon, subacromial bursitis, and biceps tendon tenosynovitis. He concluded that the accepted conditions had resolved.

On March 6, 2018 counsel requested reconsideration. He argued that OWCP had reached a false conclusion based upon the report of the DMA, Dr. Slutsky. Counsel argued that the DMA's report should not have been relied upon and appellant should have been referred for a second opinion examination.

Counsel submitted additional medical evidence. He argued that the MRI scan from March 13, 2015, and Dr. Scott's July 13, 2017 report supported appellant's claim.

In a March 20, 2018 report, Dr. Michael Lax, Board-certified in occupational medicine, examined appellant and provided physical examination findings. He diagnosed bilateral rotator cuff tears. Dr. Lax opined that, within a reasonable degree of medical certainty, appellant's work as a rural postal delivery worker with many years of exposure to heavy lifting (40-pound buckets of mail) in small spaces (her delivery car), repetitive movements (upwards of 500 stops for mail), and also a few specific events, including lifting heavy buckets of mail in December 2014 and

turning in her car to grab a package contributed significantly to the development of both bilateral chronic shoulder pain and rotator cuff tears.

On April 30, 2018 OWCP requested clarification from Dr. Scott, regarding whether appellant developed a right shoulder condition as a consequence of her accepted work-related left shoulder condition.

In a May 3, 2018 addendum, Dr. Scott noted the definition of a consequential condition and responded that it was explained in his prior report. He opined, “I do not find a consequential injury for the left or right shoulder.”

By decision dated May 29, 2018, OWCP denied modification of the March 8, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability for which compensation is claimed is causally related to the employment injury.⁶ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁷

The general rule respecting consequential injuries is that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee’s own intentional conduct.⁸ The subsequent injury is compensable if it is the direct and natural result of a compensable primary injury. With respect to consequential injuries, the Board has held that, where an injury is sustained as a consequence of an impairment residual to an employment injury, the new or second injury, even though nonemployment related, is deemed, because of the chain of causation, to arise out of and in the course of employment and is compensable.⁹

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. The opinion must be one

⁶ *A.T.*, Docket No. 18-1717 (issued May 10, 2019); *J.B.*, Docket No. 18-0522 (issued January 16, 2019); *see also J.T.*, Docket No. 17-0578 (issued December 6, 2017).

⁷ *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *K.D.*, Docket No. 17-1894 (issued August 6, 2018); *A.M.*, Docket No. 18-0685 (issued October 26, 2018); *Mary Poller*, 55 ECAB 483, 487 (2004); 1 Arthur Larson & Lex K. Larson, *The Law of Workers’ Compensation* 10-1 (2006).

⁹ *See K.D., id.*; *see also S.S.*, 59 ECAB 315 (2008).

of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the accepted employment injury.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish that acceptance of her claim should be expanded to include the conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear as a consequence of the December 12, 2014 employment injury.

Appellant's treating physician, Dr. Van Gorder did not diagnose a tear of the right shoulder until May 5, 2016, more than a year following the December 12, 2014 employment injury. The Board notes that he referred to a right shoulder MRI scan from June 2015, which revealed a partial cuff tear and tendinitis. While Dr. Van Gorder explained that appellant started to develop discomfort in the right shoulder due to favoring her left shoulder, she did not return to work following the accepted December 12, 2014 employment injury. As Dr. Van Gorder has not explained what activities appellant engaged in that caused her to favor one shoulder over the other, this report does not establish that the diagnosed conditions were directly caused or a consequence of the accepted injury.¹¹

Dr. Van Gorder provided similar opinions in his July 28 and August 3, 2016 reports. He repeated his diagnoses of status post rotator cuff tear left shoulder and partial tear with tendinitis of right shoulder. Dr. Van Gorder opined that appellant's impingement pain, tendinitis, and discomfort of the right shoulder was "definitely related to her left shoulder injury. This in my opinion the right shoulder difficulties that she has was caused by overusing secondary to her favoring her left shoulder which had been an injury at work." However, Dr. Van Gorder did not explain how he arrived at his conclusion in light of the fact that appellant had not worked since the date of the injury. He did not provide the necessary medical rationale explaining how her right shoulder condition was a consequence of the accepted left shoulder condition.¹² Dr. Van Gorder's opinion is therefore of limited probative value.

In a March 20, 2018 report, Dr. Lax diagnosed right and left rotator cuff tear. He opined that within a reasonable degree of medical certainty appellant's "work as a rural postal delivery worker contributed significantly to the development of bilateral shoulder pain and rotator cuff tears. However, Dr. Lax did not explain how he arrived at his conclusion. While the left shoulder condition was accepted, he did not explain how he concluded that the right rotator cuff tear was a consequence of the accepted left shoulder injury.¹³ Other than his general conclusion that the diagnoses were caused by the December 12, 2014 employment injury, and a brief description of appellant's activities at work, Dr. Lax provided no additional rationale explaining how the diagnosed conditions of the right shoulder were a direct and natural result of a compensable

¹⁰ See *A.T.*, *supra* note 6.

¹¹ *Id.*

¹² *Supra* note 9.

¹³ *Id.*

primary injury.¹⁴ Medical conclusions unsupported by rationale are of diminished probative value and are insufficient to establish causal relation.¹⁵

The diagnostic studies of record are insufficient to establish appellant's claim. The Board has held that reports of diagnostic tests lack probative value as they do not provide an opinion on causal relationship between his employment incident and a diagnosed condition.¹⁶

OWCP referred appellant to the DMA, Dr. Slutsky, for an opinion regarding whether the acceptance of appellant's claim should be expanded, and also referred appellant for a second opinion evaluation with Dr. Scott. Neither physician found additional employment-related conditions. The DMA reported that there was no mention of right shoulder pain for almost two years after the incident. He explained that overuse of appellant's right shoulder was "not medically probable in view of the normal functioning of her left shoulder." The DMA also reviewed the June 12, 2015 MRI scan of the right shoulder, one year after appellant's left rotator cuff repair. He explained that if appellant "had remained working in some capacity ... especially at a job that required overhead lifting ... it would be reasonable to assign the patient's development of right shoulder pain and partial rotator cuff tear to overuse, but this is not the case."

The second opinion physician, Dr. Scott, concluded that the accepted condition had resolved. He also provided an opinion which he reiterated in his May 3, 2018 addendum, that appellant did not have a consequential injury to either her right or left shoulder due to the employment injury.

The Board finds that appellant has not submitted sufficient rationalized medical evidence to establish causal relationship between the accepted December 12, 2014 employment injury and the claimed additional conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear. As such, appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions of right shoulder impingement, right shoulder tendinitis, and right partial rotator cuff tear as a consequence of the accepted December 12, 2014 employment injury.

¹⁴ *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁵ *J.B.*, Docket No. 08-1721 (issued January 26, 2009); *Albert C. Brown*, 52 ECAB 152 (2000).

¹⁶ *D.B.*, Docket No. 18-1359 (issued May 14, 2019).

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 18, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board